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9
10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 L.A. PRINTEX INDUSTRIES, INC., a
13 California Corporation,

14 Plaintiff,

15 vs.

16 TARGET CORP., a Minnesota
17 corporation, et al.,

18
19 Defendants.

Case No.: CV 06-4641 DSF (AJWx)

**DEFENDANTS TARGET CORP.
AND J.J.'s MAE, INC.'S
MEMORANDUM OF
CONTENTIONS OF FACT AND
LAW (Local Rule 16-4)**

Pretrial Conference Date: July 7, 2008
Trial Date: August 5, 2008_

20 Defendants Target Corp. and J.J.'s Mae, Inc. hereby submit their
21 Memorandum of Contentions of Fact and Law in the above-entitled action:

22 **I. CLAIMS AND DEFENSES**

23 **A. PLAINTIFFS' CLAIMS**

24 CLAIM NO. 1: Copyright Infringement

25 Elements: Plaintiff has the burden of proving the following elements by a
26 preponderance of the evidence:

- 27 a. The Plaintiff is the owner of a valid copyright; and
28 b. Defendants copied original elements from the copyrighted work.

1 See Ninth Circuit Manual of Model Civil Jury Instructions, §17.4 (2007).

2 CLAIM NO. 2: Vicarious and/or Contributory Infringement

3 (Plaintiff alleges two causes of action as a single claim)

4 Elements of Vicarious Infringement: Plaintiff has the burden of proving the
5 following elements by a preponderance of the evidence:

- 6 a. A direct infringer infringed on Plaintiff's copyright;
- 7 b. Defendants profited directly from the infringing activity of the direct
8 infringer;
- 9 c. Defendants had the right and ability to supervise or control the
10 infringing activity of the direct infringer; and
- 11 d. Defendants failed to exercise that right and ability.

12 See Ninth Circuit Manual of Model Civil Jury Instructions, §17.20 (2007).

13 Elements of Contributory Infringement: Plaintiff has the burden of proving
14 the following elements by a preponderance of the evidence:

- 15 a. A direct infringer infringed on Plaintiff's copyright;
- 16 b. Defendants knew or had reason to know of the infringing activity of
17 the direct infringer; and
- 18 c. Defendants intentionally induced or materially contributed to the
19 direct infringer's infringing activity.

20 See Ninth Circuit Manual of Model Civil Jury Instructions, §17.21 (2007).

21 **B. EVIDENCE IN OPPOSITION TO PLAINTIFFS' CLAIMS**

22 Plaintiff does not own a valid copyright. See Feist Publications, Inc. v.
23 Rural Tel. Service. Co., 499 U.S. 340, 361, 111 S.Ct. 1281, 113 L.Ed.2d 358
24 (1991); Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996). The assignment
25 document that purportedly evidences the transfer of the copyright to Plaintiff by
26 Studio Bernini is a falsified document, and Plaintiff has acknowledged that no
27 other written transfer of ownership exists. Plaintiff did not have any written
28 transfer of ownership at the time it registered its copyright, so the registration was

1 ineffective. The registration also contains other irregularities that render it fatally
 2 defective. The deposition testimony of Plaintiff's principle, Jae Nah, supports
 3 these facts.

4 Alternatively, if Plaintiff has a valid copyright, it is a thin copyright as a
 5 matter of law and samples of the alleged infringing garments and testimony by
 6 Defendants' designated witnesses will establish that the garments at issue in this
 7 case are neither identical nor "substantially similar" to the Plaintiff's Subject
 8 Design. See Express, LLC v. Fetish Group, Inc., 424 F.Supp.2d 1211, 1228 (C.D.
 9 Cal. 2006) (citing Three Boys Music Corp v. Bolton, 212 F.3d 477, 488 (9th Cir.
 10 2000); Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435, 1443 (9th Cir.
 11 1994)).

12 Defendants will seek apportionment of profits between the copyrighted work
 13 and other factors that attributed to the profits in order to reduce the amount of the
 14 damage award. Under 17 U.S.C. § 504(b), an apportionment of profits is allowed.
 15 See Polar Bear Productions, Inc. v. Timex Corp., 384 F.3d 700, 711 (9th Cir.
 16 2004). Although the division of profits between those portions attributable to the
 17 infringement and those attributable to other sources does not require "mathematical
 18 exactness", Defendants intend to introduce evidence and testimony to show that
 19 other factors, such as the style of the garment, the additional design that is co-
 20 mingled with the Subject Design, and other factors contributed significantly to the
 21 profits earned by the alleged infringers. See Abend v. MCA, Inc., 863 F.2d 1465,
 22 1480 (9th Cir. 1988).

23 **C. AFFIRMATIVE DEFENSES**

24 First Affirmative Defense

25 The Fourth Amended Complaint, and each claim asserted therein, fails to
 26 state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).
 27
 28

1 Second Affirmative Defense

2 If it should be determined that Plaintiff has been damaged, the proximate
3 cause of such damages was the conduct of Plaintiff or others for which Defendants
4 were not and is not responsible.

5 Fourth Affirmative Defense

6 At all times relevant to the Fourth Amended Complaint, Defendants had
7 good faith defenses, based in law and/or fact, which, if successful, would preclude
8 any recovery by Plaintiff based on the allegations of the Complaint.

9 **D. EVIDENCE IN SUPPORT OF AFFIRMATIVE DEFENSES**

10 J.J.'s Mae's and Target's business records and deposition testimony
11 establish that Defendants were at all times unaware that the garment at issue bore a
12 design that Plaintiff has alleged was its protected intellectual property. J.J.'s Mae
13 purchased the fabric bearing a modified version of the design from Gin'l Fabrics, a
14 third party, who represented to J.J.'s Mae that there were no copyright issues. The
15 documents show that it was Gin'l who acquired the fabric from Plaintiff, made
16 infringing copies, and sold those infringing copies to J.J.'s Mae who remained
17 unawares. Defendants had no direct access to Plaintiff's design at any time.

18 Moreover, the assignment document that allegedly evidences a transfer of
19 ownership of the Subject Design from Studio Bernini to Plaintiff will establish that
20 Plaintiff does not own a valid copyright, lacks standing to assert the infringement
21 of copyright claims, and has failed to state a proper claim.

22 Testimony of Defendants' designated witnesses and a side by side
23 comparison of the offending garment and the Subject Design will establish that
24 they are not identical or substantially similar. To the extent there is any similarity,
25 the evidence will show that any profits made by Defendants derived from the non-
26 infringing portions of the garment, the design or the garment, and other attributes
27 of the garment unrelated to the alleged infringement.
28

1 **II. ANTICIPATED EVIDENTIARY ISSUES**

2 Defendants anticipate that Plaintiff will object to the use of summary charts
3 and testimony and argument related to those charts. The charts indicate profit
4 levels, costs, profit apportionment, and the like. They were prepared by
5 Defendants in the normal course of business and were produced to Plaintiff during
6 discovery. Defendants will oppose any restrictions on the charts or argument or
7 testimony related thereto.

8 **III. BIFURCATION OF ISSUES**

9 Defendants do not request bifurcation of any issues.

10 **IV. JURY TRIAL**

11 Defendants do not request a jury trial. Defendants request a bench trial.

12 **V. ATTORNEYS' FEES**

13 Attorneys' fees are recoverable pursuant to 17 U.S.C. §505. However, the
14 award is discretionary. If Defendants are determined to be the prevailing party,
15 they will seek an award of attorneys' fees and costs.

16 **VI. ABANDONMENT OF ISSUES**

17 Defendants abandon their third affirmative defense.

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19 Dated: June 19, 2008

JANIN, MORGAN & BRENNER
A Professional Corporation

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21
22 By: /s/John A. Lofton
23 John A. Lofton, Esq.
24 Attorneys for Defendant J.J.'s Mae, Inc. and
25 Target Corp.
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